United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

ORIGINAL

75-4052

To be argued by
ELLIOTT C. WINOGRAD

In The

United States Court of Appeals

For The Second Circuit

TNT TARIFF AGENTS, INC. and NATIONAL CARLOADING CORPORATION,

Petitioners,

vs.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA,

Respondents.

On Petition for Review from Order of the Interstate Commerce Commission

B
P/S

BRIEF FOR PETITIONERS

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STATEMENT OF ISSUE PRESENTED

The principal issue herein presented is whether or not the subject orders of the Interstate Commerce Commission which found that petitioners' tariff was unjust and unreasonable and which further cancelled and annulled said tariff, were arbitrary, capricious, erroneous in fact and law, or unsupported by substantial evidence. It is petitioners' contention that the subject tariff was just and reasonable and that the orders before this Court ought to be rescinded.

STATEMENT OF THE CASE

1. HISTORY OF PROCEEDINGS BY THE PETITIONERS BEFORE THE INTERSTATE COMMERCE COMMISSION UNDER DOCKET NO. 35921.

On or about August 10, 1973, petitioner National Carloading Corporation, who is a freight forwarder under Part IV of the Interstate Commerce Act, through petitioner TNT Tariff Agents Inc., (hereinafter referred to as "TNT"), filed Tariff No. 14, ICC-FF No. 15 on page 31, item No. 619 and on page 108, item 80040 (hereinafter referred to as "Tariff East"), which states as follows (Joint Appendix,* pp. 108a, 109a):

"SHIPMENTS DELIVERED TO FORWARDER

> Rates, charges and provisions which do not include pickup service apply only when the shipments are delivered directly to Forwarder's facilities. Shipments which are delivered to Forwarder's Agents will not be considered to be delivered to the Forwarder and will not be subject to rates, charges, and other provisions which do not include pickup service. Except as otherwise provided, where tariffs making reference to this tariff do not provide LTL rates applicable when no pickup service is afforded, the rates in the applicable tariffs making reference to this tariff will be subject to the provisions of Column D of Note 1 or in the absence of specific provisions reference hereto for rates which do not include pickup service, such rates will not apply except at New York, N.Y.,

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* Joint Appendix hereinafter referred to as "JA" without designation of p. (page) or pp. (pages).

> on shipments under five hundred pounds they will apply, and in lieu thereof the rates which do include pickup service will apply and be subject to Column D of Note 1 herein or in the absence of specific provisions or Column D the rates which include pickup service less one dollar per hundred pounds will apply.
>
> Item 80040 of the same tariff is identical to item 619 except in the second paragraph the abbreviation 'LTL' is omitted."

The aforementioned tariff went into effect on September 10th, 1973 (JA109a) and was not protested.

On or about October 1st, 1973, Lifschultz Fast Freight, Inc., (hereinafter referred to as "Lifschultz") filed its tariff Item No. 93 on 8th revised, page 11, Tariff No. 12-B, ICC-FF No. 8, which was to become effective on October 25th, 1973, which is identical to TNT's above stated tariff (JA105a-108a).

On or about October 11, 1973, the Eastern Central Motor Carriers Association, Inc., (hereinafter referred to as "Eastern") protested Lifschultz' tariff and also requested an investigation in to the TNT tariff which became an issue for the first time in Investigation Docket No. 35921, "Allowance for Delivery of Shipments to Forwarders' Facilities." This occurred as an order at a session of the Interstate Commerce Commission, Suspension and Fourth Section Board,

on the 19th day of October, 1973 (JA28a).

Thereafter, on or about October 25th, 1973, Lifschultz filed a petition requesting that the order of suspension against it be vacated and at a session of the Interstate Commerce Commission, Appellate Division 2, acting as an appellate division, on the 16th day of November, 1973, under Investigation and Suspension Docket No. 8894, denied Lifschultz' request.

In accordance with the order of the Commission dated the 19th day of October, 1973 (JA28a), Lifschultz filed its Opening Statement of Facts and Arguments under Investigation and Suspension Docket #8894, "Allowance for Delivery of Shipments to Forwarders' Facilities"; TNT filed its Opening Statements of Facts and Arguments under Docket #35921 (JA30a), "Allowance for Delivery of Shipments to Forwarders' Facilities"; Eastern filed its Opening Statement of Facts and Arguments under Docket #35921 (JA78a) and Investigation and Suspension Docket #8894, both entitled, "Allowances for Delivery of Shipments to Forwarders' Facilities."

Subsequently, TNT filed an additional thirty (30) supporting letters from various shippers and requested that they be appended to its papers dated November 13th, 1973 (JA76a).

This request was denied at a session of the Interstate Commerce Commission, Division 2, on the 11th day of December, 1973 (JA7a [No. 6]).

By order dated the 7th day of March, 1974, the Administrative Law Judge ordered that the TNT Tariff East in question be cancelled and the proceedings discontinued (JA104a).

Thereafter, TNT filed its exceptions (JA117a) to the initial decision and findings and orders of the Administrative Law Judge and Lifschultz filed its exception to same, and at a session of the Interstate Commerce Commission, Review Board #4, held on the 12th day of July, 1974, the Review Board decided in part, (JA134a-135a),

> "We find that the . . .does not warrant a result different from that reached by the Administrative Law Judge. . .and they are hereby affirmed and adopted as set down.
>
> It is hereby ordered that the respondent herein, be, and they are hereby, notified and required to cancel the schedule described in the Orders, entered October 11th, 1974,. . .and that these proceedings be, and they are hereby, discontinued."

Thereafter, by petition of TNT for reconsideration (JA136a) of the decision and order of Review Board #4, at a session of the Interstate Commerce Commission, Division 3, acting as an appellate division, on the 24th day of Jan-

uary, said order stated in part (JA177a),

> "it is ordered, that the petition for reconsideration and for further hearing be, and it is hereby denied. . .
>
> And it is further ordered that the order entered in these proceedings on July 12th, 1974, which order, pursuant to Section 17 (8) of the Interstate Commerce Act, was stayed pending disposition of the objection be, and it is hereby, reinstated and modified so as to become effective 30 days from date of service herewith with another change in the requirement of said order."

On February 28th, 1975, petitioners brought on a petition before the entire Interstate Commerce Commission and requested a stay of order which was denied (JA181a-189a).

The initial decision (JA104a) is erroneous in several respects. The first error occurs at page 6 (JA110a) of the initial decision, in the summation, wherein the Administrtive Law Judge states that TNT's statement that freight forwarders' pickup costs are "skyrocketing" was unsubstantiated. As pointed out in TNT's exceptions (JA117a) this statement was clearly false. Second, the Judge's conclusion that Tariff East was not shown to be justified (JA112a) was erroneous and totally unsubstantiated by the record before him. This point was also made in TNT's exceptions (JA117a). Third, the Judge concluded that Eastern established a <u>prima</u>

facie case against Tariff East's justness and reasonableness (JA113a). Such a conclusion was clearly erroneous in view of the record before the Judge. This error was specifically addressed in TNT's exceptions (JA117a). Additionally, the Administrative Law Judge concluded that Tariff East would result in disruption of the rate structure (JA113a-114a). As pointed out in TNT's exception (JA117a), not only was such a conclusion erroneous, but of no probative value. Also, even if Eastern's allegations were taken at face value, the Administrative Law Judge abused his discretion by completely annulling Tariff East (JA115a).

Even a cursory reading of the initial decision (JA104a-115a) demonstrates that the Judge placed the burden of persuasion upon TNT. In doing so, the Judge, as a matter of law, was in error. In addition thereto, the net result of the initial decision conflicts with public policy and the general welfare of this country.

The Judge erroneously concluded that Eastern had established a prima facie case that the subject dock rates were unjust and unreasonable (JA113a). Such a conclusion was totally unwarranted by the record before him. The only evidence submitted by Eastern applied to motor carriers

(JA78a-84a), a completely different mode of business than that of TNT which is a freight forwarder.

Lastly, the entire matter before ICC with respect to Tariff East was captioned, "Allowance for Delivery of Shipments to Forwarders' Facilities" (JA105a). Such a caption was a misnomer which beclouded the issues here involved and, quite possibly, prejudiced the reasoning of the Administrative Law Judge.

In sum, the facts above amply demonstrate that the subject orders of ICC were arbitrary, capricious, erroneous in fact and law, and unsupported by substantial evidence.

2. HISTORY OF PROCEEDINGS BY THE PETITIONERS BEFORE THE INTERSTATE COMMERCE COMMISSION UNDER DOCKET NO. 35921 (SUB. NO. 1)

Similarly, TNT's Tariff No. 14, ICC-FF No. 15, item 52,000 (hereinafter referred to as "Tariff West") was duly filed and became effective on September 10, 1973 (JA309a). The wording of Tariff West is identical to that of Tariff East. Tariff East covers the East Coast and Tariff West covers the West Coast (JA309a, 310a). Tariff West also was not protested.

On or about October 1, 1973, intervenor Lifschultz filed a tariff item identical to Tariff West to become ef-

fective October 25, 1973. The intervenor Freight Forwarders Tariff Bureau, Inc. ("FFTB") filed an identical tariff item which was protested on November 27, 1973, by intervenor Rocky Mountain Motor Tariff Bureau, Inc. (hereinafter referred to as "RMB"). As a result of this protest, Tariff West also became subject to investigation (JA193a, 194a).

The Tariff West controversy became consolidated with Tariff East under ICC Docket #35921 (Sub. No. 1), also entitled, "Allowance for Delivery of Shipments to Forwarders' Facilities," (JA193a). By order dated May 29, 1974 (JA308a-314a) based upon the initial decision and findings and order of Albert E. Luttrell, Administrative Law Judge, Tariff West was ordered cancelled and the proceedings discontinued by the Interstate Commerce Commission (hereinafter referred to as "ICC"). Thereafter, TNT filed exceptions (JA315a) to the initial decision which were rejected by ICC, Review Board #4, by order dated December 3, 1974 (JA330a-331a). On January 6, 1975, TNT petitioned ICC for reconsideration of Review Board #4's decision and order (JA332a). ICC, Division 2, acting as an appellate division, denied the petition by order dated March 6, 1975 (JA378a).

Tariff West was handled similarly to Tariff East by ICC. TNT's exceptions (JA315a) to the initial decision of

Administrative Law Judge Judge Albert E. Luttrell, dated May 29, 1974 (JA308a-314a), were summarily dismissed by ICC, Review Board #4, with almost the same wording used in dismissing its Tariff East exceptions (JA330a). Thereafter, ICC denied TNT's petition for reconsideration of this decision and order (JA378a). Again, ICC twice ratified and thereby perpetuated the errors of the Administrative Law Judge. The specific errors of the initial decision of Judge Luttrell are detailed herein.

Initially, the Tariff West matter was captioned, "Allowance for Delivery of Shipments to Forwarders' Facilities" (JA308a-314a). This misnomer, as discussed above, fails to distinguish between "dock rates" and "allowances." It is apparent that this misleading caption was not only indicative of ICC's failure to understand the issues involved, but also apparently prejudiced the decision of the Administrative Law Judge.

A reading of the initial decision also reveals several other errors. At page 5 of his decision (JA313a), the Judge concluded that it was not material whether the subject provisions were considered as creating allowances or rate reductions because as either they had not been shown to be

justified. Such a statement not only revealed a lack of appreciation for the evidence before the Judge, but also imposed upon TNT a burden of persuasion and proof not legally theirs to meet. The judge erroneously concluded that RMB had established a prima facie (JA313a) case that the subject dock rates were unjust and unreasonable. Such a conclusion was totally unwarranted by the record before him. The only evidence submitted by RMB applied to motor carriers (JA285a-300a), a completely different mode of business than that of TNT which is a freight forwarder.

In sum, the facts above amply demonstrate that the subject orders of ICC were arbitrary, capricious, erroneous in fact and law, and unsupported by substantial evidence.

3. HISTORY OF CONSOLIDATED PROCEEDINGS BY THE PETITIONERS BEFORE THE INTERSTATE COMMERCE COMMISSION LEADING TO THIS COURT.

On March 20, 1975, TNT moved this Court for an order to stay pendente lite, the order of the ICC (Tariff East) which cancelled and annulled Tariff East (on file with the Clerk of the Court). Additionally, on March 20, 1975, TNT filed its petition for review (JA10a). Thereafter, on March 24, 1975, ICC by order voluntarily stayed enforcement of its own order pending review of same by this Court (JA20a). On

April 9, 1975, ICC, after having been advised that TNT would file a petition for review and motion for stay with this Court, with regard to Tariff West, voluntarily stayed, by order (JA22a), pending review by this Court, enforcement of its own order which cancelled and annulled Tariff West. On April 1, 1975, TNT filed an affidavit of correction (JA23a), withdrawing two petitioners from the proceedings. On April 21, 1975, TNT duly filed with this Court an amended petition for review (JA14a-19a) to embrace the disputes concerning both Tariff East and Tariff West because they involved identical issues of fact and law which are presented herein. On May 20, 1975, this Court, by order (JA 25a) granted permission to Eastern to intervene and by order (JA 26a) dated May 25, 1975, granted permission to RMB to intervene herein.

4. A SHORT SYNOPSIS OF A COMPARISON BETWEEN A FREIGHT FORWARDER AND A MOTOR CARRIER.

FREIGHT FORWARDER - Can use its own equipment and manpower only within "Commercial Zones" of the cities where its terminals are located. The "Commercial Zones" are defined by the Interstate Commerce Commission. If the forwarder has operating rights beyond these "Commercial Zones" it must handle shipments from these points through motor carrier agents. These motor carriers may or may not enter into agreements with the freight forwarder to provide pick up or delivery

service for the freight forwarder beyond the "Commercial Zone." At best a 409 contract (Interstate Commerce Act, Part IV, Section 409) between the freight forwarder and the motor carrier may be executed (called concurrences). See Freight Forwarder-Motor Common Carrier Agreements, 272 I.C.C. 413. At worst, the motor carrier will perform the service subject to its tariff published rates ("local rates") which would be substantially higher than those provided for in a mutually agreed to 409 concurrence contract. In other words, beyond the "Commercial Zones" a freight forwarder is at the mercy of any motor carrier which can perform pick ups or deliveries to or from points for which the freight forwarder has operating rights. The operations of freight forwarders are described in Chicago, M., St. P., and Pacific R. Co. v. Acme Fast Freight, Inc., 336 U.S. 465 and Interstate Commerce Act, Part IV, Section 402. For freight forwarders history see, Fair and Guandolo, Transportation Regulation (Wm. C. Brown, 7th Ed.) pp. 79-84.

MOTOR CARRIER - Within its operating sphere, can use its own equipment and manpower to service all of its points, within or without the "Commercial Zone." Also, it may enter into agreements with other motor carriers to service points on a proportional basis, even though both carriers may service

the same point. This would be done for convenience sake or economic reasons. In the latter case, all the motor carriers involved in a movement of freight would share in the revenue accruing to the shipment on the basis of the actual participation in the movement by each carrier. The freight forwarder cannot do this. It handles all its shipments on a "through rate" basis and must pay any other carrier whatever sum of money to perform the necessary services for completion of the transportation services which is contracted between the freight forwarder and the shipper. See, Classification of Motor Carriers of Property, 2 M.C.C. 703.

ARGUMENT

THE ORDERS BEFORE THIS COURT FOR REVIEW ARE ARBITRARY, CAPRICIOUS, ERRONEOUS IN FACT AND LAW, AND UNSUPPORTED BY SUBSTANTIAL EVIDENCE, AND SHOULD, THEREFORE, BE RESCINDED.

POINT I

THE INTERSTATE COMMERCE COMMISSION ERRED AND ACTED ARBITRARILY AND CAPRICIOUSLY AS TO TARIFF EAST AND TARIFF WEST.

I respectfully refer this Court to the decision and conclusion of the Administrative Law Judge (Tariff East) at pages 8 through 10 (JA112a-114a) where he states that TNT must prove that its (TNT's) tariff is "just and reasonable", and that the burden of proof is on TNT to establish a prima facie case and that the assailed legally established schedules of rates are unlawful. I respectfully submit, even if TNT stood mute, this would not shift the burden of proof, nor could the failure to advance evidence be used against TNT.

I further respectfully refer to Eastern's "Statements of Facts and Arguments" (JA78a-96a) and demonstrate to this Court that ICC seriously erred and acted arbitrarily and capriciously in accepting Eastern's facts and figures (JA84a, 89a) based on Motor Carrier Bureau Costs (keeping in mind the fact that petitioners are freight forwarders) which are completely understated and which are not applicable to the TNT Freight Forwarders operation. I refer this Court to a verified statement of Craig F. Rockey (JA150a-159a) for a proper representation of

the functions and costs thereof. On this basis alone, the Administrative Law Judge should have found that Eastern had failed to meet its burden and the investigation should have been discontinued.

ICC erred and acted arbitrarily and capriciously in refusing to recognize that "Dock Rates" have been in existence for many, many years. I refer this Court to the Administrative Law Judge's "Discussion and Conclusions" on page 10, last paragraph (JA114a) wherein he states, "the decision herein should not be viewed as discouraging innovatible rate making . . . ."

In fact, dock rates have been part of freight forwarders' publications for many, many years and they are a form of rate publication indigenous to the freight forwarders' industry.

Eastern admitted at page 14 of its submission (JA92a) that:

> "Protestant does not deny the fact that the publication of rates applicable (from) the terminals of receiving stations (dock rates) is a well established method of publishing rates." (Underscoring supplied.)

Indeed, dock rates have been in existence for many, many years (JA32a). For example, dock rates were published in ABC Freight Forwarding Corporation Tariff ICC-FF 48 effective March 30, 1959. Dock rates were provided for on pages 46 and 104.

It should be noted that these dock rates were brought forward from earlier publications which go back much farther in time. Dock rates were also brought forward in TNT Tariff ICC-FF 4 which became effective March 19, 1973. Similarly, Republic Carloading and Distributing Company, Inc., also published dock rates in its Tariff ICC-FF 199 effective September 2nd, 1959, brought forward in Supplement No. 262 to ICC-FF No. 199 effective May 14th, 1974. Also, Universal Carloading and Distributing Company published dock rates effective May 2nd, 1962, in it Tariff ICC-FF No. 308 brought forward in Supplement 165 to ICC-FF 308 effective April 4th, 1973 (for all tariffs cited herein refer to JA144a).

The foregoing clearly demonstrates that dock rates have been a part of freight forwarder publications for many, many years and that they are a form of rate publication indigenous to the freight forwarder industry. To declare, as the Judge did, that dock rates constitute a disruptive force to the rate structure of TNT implies that this form of publication is novel and without precedent. This is hardly the case as shown above; and the $1 dock rate (Tariff East and Tariff West) will cause no more disruption than dock rates have in the past.

ICC erred and acted arbitrarily and capriciously in that

it was unable to demonstrate (as was Eastern) that despite the fact that the dock rates had been in effect since July 31st, 1972, Eastern had had to make a downward revision of its rate and had evidenced a diversion of traffic. Additionally, there has been no showing of harm to Eastern or its member carriers. Although Eastern's protest included only that territory in which its member carriers operated, it should be noted that Tariff East applies through-out the United States (except the west coast) at each and every terminal of TNT. I hereby represent to this Court that TNT has not received any opposition to these tariff provisions from any other motor carrier or motor carrier bureau or any other competing mode of transportation.

The Commission erred and acted arbitrarily and capriciously in calling for complete cancellation of Tariff East (JA108a, 109a). Assuming for the moment (not admitting same) that Eastern did make out a prima facie case for the territory in which it is involved, by what logic does the Administrative Law Judge extend this beyond Eastern Central territory? Item 80040 (JA109a) of Tariff East applies from East and Midwest to Florida and Louisiana. These are movements in which Eastern has no competitive interest. It is noteworthy (and I hereby rep-

resent same to this Court) that Southern Motor Carrier Rate Conference and Central and Southern Motor Freight Carriers Rate Conference and Central and Southern Motor Freight Tariff Association, Inc., submitted no protests or complaints with respect to these dock rates in question before the Court.

Item #619 (JA108a) of Tariff East touches on Eastern territory but also goes beyond it. It applies as well from the East to the South; from Illinois Freight Association territory (hereinafter referred to as "IFA") to the Southwest; from IFA to the South; Illinois and Minnesota; between Trunk Line and New England and Colorado and Wyoming; within middle Atlantic territory; and several other moves.

All these moves are <u>not</u> served by Eastern, who certainly could have no competitive interest in them. Here again, (I respectfully represent same to this Court) no protests or complaints were filed by the involved motor carrier rate bureaus.

Clearly, the Administrative Law Judge went far astray from the evidence of record in calling for a wholesale cancellation of Item #619 and #80040 of the TNT Tariff East (JA108a, 109a).

The Commission erred and acted arbitrarily and capriciously wherein the Administrative Law Judge in his discussion and decision on page 7, last paragraph, (JA111a) stated, "Eastern

. . . submitted figures to show that the fully allocated costs to its member carriers to perform pickup services exceeds $1 per 100 lbs. for shipments of 400 lbs. and under, but the cost falls below that on shipments of 500 lbs. and above . . . ."

I respectfully submit to this Court the query that, even if Motor Carrier costs were completely evident (which they are not) in judging the freight forwarders' rate case, how can the Administrative Law Judge deny the fact that such costs exceed the rate reductions on shipments of 400 lbs. and less? This being so, then at the very least, the Judge should have found that neither Eastern nor the Commission made out a prima facie case for this segment of traffic.

As to the Tariff West Decision and conclusion (JA308a-314a) of the Administrative Law Judge, he, too, seriously erred (as did the Judge in the Tariff East Decision) by placing the burden of proof on TNT; by comparing motor carrier costs to freight forwarder costs; by refusing to recognize that "dock rates" have been in existence for many, many years; and by failing to demonstrate (as has RMB) a downward revision of rates by any motor carrier, or diversion of traffic, or harm to RMB or its member carriers; and last but not least, by the wholesale cancellation of Tariff West.

POINT II

THE SUBJECT ORDERS, ON THEIR FACES, ARE ERRONEOUS BECAUSE THEY FAIL TO DEMONSTRATE ANY APPRECIATION FOR THE SIMPLE DISTINCTION BETWEEN "DOCK RATES", WHICH THE TARIFF OBVIOUSLY IS AND "ALLOWANCES".

The subject orders of ICC (JA134a, 177a, 330a, 378a) perpetuated the initial decisions (JA104a, 308a) of the Administrative Law Judges without modification. Hence, these decisions, and the records before the Judges, are properly the focal point of all discussion herein. With respect to both Tariff East and Tariff West, the entire tenor of both initial decisions reveals a failure to grasp the distinction between "dock rates" and "allowances". Both decisions were clearly predicated upon a mischaracterization of TNT's dock rates as impermissible allowances. The difference between a "dock rate" and an "allowance" is a real one. In failing to grasp the distinction between these two concepts, ICC erred.

It is also patently clear that both Administrative Law Judges mischaracterized the TNT tariff as allowances, and in so doing, wrote lengthy decisions that were not only irrelevant to the issues before them, but prejudiced the disposition of the cases.

It is interesting to note, at the outset, that both matters before the ICC have been captioned "Allowance for Delivery of Shipments to Forwarders' Facilities" (JA104a, 308a) thus revealing a consistency of mischaracterization. A mere glance at the Tariff East decision (JA104a) reveals many references to allowances, and additionally, relies upon reported cases which deal specifically with allowances. Even the introductory "squib" on page one (1) of the initial decision (JA105a) describes Tariff East as an "assailed allowance". Page 8 of the Tariff East decision (JA112a) is even more indicative of how the Administrative Law Judge compounded his error. He there states that, "It is immaterial whether the assailed provisions ... are considered as creating allowances or rate reductions ...." He then proceeds to state that, "An allowance of any type can be no more than is just and reasonable." (Emphasis added.) In support of this proposition, however, the cases cited by the Judge (JA112a) are all ones pertaining to "allowances" rather than "dock rates."

The Administrative Law Judge (in Tariff East) cites only two precedents in his decision, both of which deal with allowances and are hence not relevant to the issues before him. A cursory reading of Freight Forwarder Allowances at

Baltimore, Md., 315 I.C.C. 719, 721, reveals that the parties involved designated the tariff as an allowance. In the instant matter, however, TNT has firmly and repeatedly asserted that the assailed tariff is a "dock rate", and secondly, in the case before this Court, the tariff (Tariff East and Tariff West) was in effect at the time of the investigation. The cases of New York Central Railroad Company v. United States, 199 F. Supp. 955 (S.D. N.Y., 1961) and El Dorado Oil Works v. United States, 328 U.S. 12 (1946) are also not relevant for the identical reasons.

Apparently, the Administrative Law Judge was somewhat persuaded by Eastern's arguments. He should not have been. In predicating his conclusions upon treatment of an already effective dock rate as a proposed allowance, error was committed.

In the Tariff West Initial Decision (JA308a) the Administrative Law Judge used an identically improper analysis. He constantly referred to the assailed dock rate as an allowance. Similarly, he dismissed as immaterial the distinctions between allowances and dock rates and relied upon precedents which pertain to proposed allowances (JA313a). The submissions of RMB in the Tariff West proceedings cite cases

(JA293a-297a), some of which have been heretofore discussed. All of them are easily distinguishable from the one at Bar because they deal with proposed allowances rather than dock rates already legally in effect.

Because of the Administrative Law Judges' failure to recognize the difference between dock rates and proposed allowances, much less to appreciate dock rates already legally in effect, the conclusion that both initial decisions are improper on their faces is inescapable. This failure tainted the proceedings which followed and which resulted in the perpetuation of these errors.

The Administrative Law Judge (JA112a) also showed reliance upon Pickup and Delivery Allowance at St. Louis and Kansas City, 64 M.C.C. 163, 166. Again, this case clearly deals with proposed allowances and not dock rates.

In the Tariff East proceedings, Eastern submitted a statement of facts and argument (JA78a). The cases relied upon in Eastern's argument, however, pertained to allowances and not dock rates. In Morgain Forwarding Co., Pickup and Storage, 258 I.C.C. 771, Division 3 decided that certain proposed allowances were not just and reasonable. The case did not concern dock rates. Eastern also cited several cases

which, it asserted, stand for the proposition that in evaluating proposed allowances the ICC has consistently adhered to the principle that the amount paid should not be more than just and reasonable for the service furnished and should not exceed the reasonable cost of the shipper or receiver had it performed the service. The cases cited, however, all pertain to allowances and not dock rates. Thus the cases Allowances for Privately Owned Tank Cars, 258 I.C.C. 371, 387; Pickup and Delivery Allowance at Detroit, Michigan, 301 I.C.C. 319, 321; Delivery Allowance in Central Territory, 309 I.C.C. 187, 188; and Combined Bill of Lading-Freight Bill Allowance Eastern Central States, 323 I.C.C., 168, 172, although relied upon by Eastern, are not here relevant because they pertain to allowances not dock rates. Further, and equally important, all of the above cases deal with proposed allowances.

The obvious must be turned to. What is the difference between "allowances" and "dock rates?" The lay person may obviously say, "A reduction of rate, either way you look at it, boils down to an 'allowance'". This thinking which prevails is totally unsound and erroneous. Dock rates are published tariffs in which the proof that must be demonstrated is simply that the rates are just and reasonable. See Part IV,

Interstate Commerce Act. With dock rates, the shipper or consignee pays what is stated in the published tariff. With dock rates either the shipper or consignee can benefit depending upon who pays the shipping bill.

Allowances are a "horse of a different color." Allowances are also contained in a published tariff. However, for a shipper or consignee to derive the benefit of an allowance, the common carrier must file with the Interstate Commerce Commission in which the proof that must be demonstrated is that the rates are just and reasonable and that the proposed allowance is not in excess of the average shippers' cost of performing these services. See Section 415, Interstate Commerce Act and Freight Forwarder Allowance at Baltimore, Md., 315 I.C.C. 719. If, in the event the allowance is approved, the shipper or consignee, in order to recoup his allowance, must forward to the Common Carrier a statement at the end of each month showing total tonnage shipped, etc., at which time he will receive back his allowance.

A further important distinction between allowances and dock rates is the fact that the dock rate in the published tariff states the exact services to be performed by a freight forwarder, and obviously, "you get what you pay for." In

an allowance situation, the shipper seeks to modify the services being provided insofar as reducing the services that the Common Carrier is providing in order to obtain a reduced rate.

ICC erred and acted arbitrarily and capriciously in refusing to recognize that "dock rates" have been in existence for many, many years. I refer this Court to the Administrative Law Judge's "Discussions and Conclusions" on page 10 wherein he states, "The decision herein should not be viewed as discouraging innovative rate making . . . " (JA114a).

In fact, dock rates have been part of freight forwarder publications for many, many years and they are a form of rate publication indigenous to the freight forwarders' industry.

POINT III

DOCKET NO. 35921: TARIFF EAST: THE PUBLIC'S NEED FOR DOCK RATES AND EXPLANATION THEREOF.

Initially, it is our opinion that the caption "ALLOWANCE FOR DELIVERY OF SHIPMENTS TO FORWARDERS' FACILITIES" assigned to this proceeding is misleading and tends to cloud the basic issue here involved.

Allowances in lieu of pickup performed have been maintained by freight forwarders as well as motor carriers over the years. Allowances so published require, in addition to detailed record keeping, that the shipper submit a periodic statement for the amount of the allowance so published. Furthermore, such allowances are only paid to shippers located within a terminal area or commercial zone.

The dock rates published by petitioners in the instant proceeding have no relationship whatsoever to allowances specifically detailed above. Additionally, unlike allowances, they result in lower freight charges to whomever pays the freight -- not exclusively to the shipper.

As cited in petitioners' opening statement (JA41a-45a) the publication of rates applicable from the terminals or receiving stations (dock rates) of the forwarders participating in peti-

tioners' tariff is a well established method of publishing rates. Petitioners' opening statement (JA41a-45a) clearly indicates that a varying dollar difference exists between rates published on various commodities which include the service of pickup and those rates that do not include a pickup service. Specific reference is made to the Freight All Kinds level of rates shown on (JA41a-45a) as published in Item 506 of Freight Forwarders Tariff Bureau Tariff 55-G, ICC-FF No. 222 (JA385a) dock rate charge of $1225.48, effective from Newark to San Francisco, which does not include the service of pickup, likewise applies only to the freight forwarder's facility in San Francisco and does not include the service of delivery. The normal level of rates with pickup and delivery using Class 45 as an example, is $1632. The difference, therefore, between the pickup and delivered rate is $406.52. Inasmuch as pickup and delivery charges on volume traffic are comparable to each other, it is, therefore, apparent that the shipping public is not only saving $203.26 on the pickup, but, a like amount on delivery. Using 24,000 pounds (hereinafter referred to as "lbs.") as a basis, the saving equates to 85¢ per hundred lbs. (hereinafter referred to as "cwt.") for pickup and 84¢ per cwt. for delivery. In addition to this level of Freight All Kinds rates, all rates

shown in this tariff were under investigation in Docket No. 35357 which was prompted by protest filed by the Rocky Mountain Motor Tariff Bureau (JA32a).

A full and complete investigation was made and after consideration of the facts, the Interstate Commerce Commission rendered a decision stating that rates and charges named therein were just and reasonable and were allowed to remain in effect. During this investigation, the Rocky Mountain Motor Tariff Bureau, Inc., alleged that these rates would establish a tremendous competitive force and a diversion of traffic (JA33a).

However, to TNT's knowledge, the carrier parties to the Rocky Mountain Motor Tariff Bureau have elected not to meet this alleged competition.

Reference is also made to petitioners' opening statement (JA41a-45a) which depicts a level of rates applying from New York, New York to Los Angeles, California, on a list of commodities referred to as retail merchandise. Considering cotton clothing as an example, which moves in substantial quantities under this rate level, it can be seen that on shipments delivered by shippers in less than truckload quantities of 171 lbs., the rate, not including a pickup, is $10.31 per cwt.,

whereas the rate on less than truckload movements of cotton clothing which include pickup, is $17.78, a difference of $7.47 per cwt. The need for this type of rate structure was to meet the competition of unregulated pool car operators and was in no way designed to attract or accomplish diversion from competing regulated modes of transportation (JA33a).

It should be further noted that TNT Tariff Agents, Inc., Tariff No. 3, ICC-FF No. 4, (JA431a) in which TNT freight forwarders participate, names a separate scale of class rates that do not include a pickup (dock rate). Referring to petitioners' opening statement, Exhibit No. 2 (JA45a), it can be seen that this dock rate structure of class rates which has been effective for years, reduces the rate on less than 500 lbs., between New York and Chicago by $1.02 cwt. on Class 100 traffic which includes pickup. A similar relationship exists on rates published for weights of 500 lbs. and 1,000 lbs.

That the cost to petitioners' freight forwarders for providing pickup service, not only within the terminal area, but outside of same, is skyrocketing, is clearly evidenced in Advance Statements of Justification submitted to the Commission in connection with recent general increases sought (JA34a). This spiraling cost has in most cases exceeded the amount that

Freight Forwarders have been able to recoup through general increases, and, therefore, it is apparent that this method of publishing rates is vital to the freight forwarders' survival and likewise other innovations must be considered. The instant publication that was under investigation by the Commission has the effect of stabilizing the forwarders' cost of doing business on this segment of our through transportation (JA34a).

Most freight forwarders, including petitioners' freight forwarders, provide pickup service within terminal areas through affiliated companies. The normal operation for such pickups is to combine same with deliveries. The local pickup and delivery vehicles are loaded during non-business hours throughout the night and dispatched to effect such deliveries the following morning, the start of the business day. When these deliveries are completed, the pickup operation commences and the vehicles generally return to the freight forwarders' facility with the freight picked up, at the close of the business day. When pickup is performed by the freight forwarder in this manner, the freight must be physically checked at the shipper's platform with the driver helping and supervising the loading thereof. This freight must be checked once again upon

return to the freight forwarders' facility prior to being loaded into an outbound line haul vehicle (see JA34a).

Through application of the rates here involved, when freight is delivered by shipper to the freight forwarder's facility, only one physical check of the freight is necessary prior to loading into the line haul vehicle. Secondly, shippers are in a position to secure a possible 24 hour better service, as freight delivered within the normal working hours can be directly loaded for release the same day. The operation of a local pickup service by the freight forwarder, inasmuch as the pick-up trucks arrive after the closing of the business day, usually results in delays in releasing this freight until the following day (see JA35a).

Section 409, Part IV of the Interstate Commerce Act, permits freight forwarders to negotiate with motor carriers a rate for performing pickup service outside of the delivery area, less than published tariff rates. It is becoming more and more difficult to maintain a level of pickup cost under Section 409 as many carriers do not wish to provide the service for less than their published tariff rates. As a common carrier, freight forwarders find that many movements cannot return out of pocket expenses. This situation is certainly not

unique with TNT freight forwarders as same is an industry problem (see JA35a).

To further point out that this method of publishing rates is not new, reference is made to ABC Freight Forwarding Corporation, Tariff 9-E, ICC-FF 77, Item 619A therein, which has been in effect since July 31st, 1972 (JA381a) a period in excess of two years, the same provisions here involved. Similar provisions were published by Midland Forwarding Corporation in Item 619A, Supplement 122 to its ICC-FF No. 35, both effective July 31st, 1972 (JA383a). Both ABC Freight Forwarding Corporation and Midland Forwarding Corporation operate within the territory embraced by motor carriers parties to the Eastern Central Motor Carrier Association and it is difficult for TNT to conceive that no reference was made in the protest to the Interstate Commerce Commission concerning this publication. It would appear that the effectiveness of these provisions has in no way affected the traffic flow of the motor carriers as no reference to lost business was furnished, and it is likewise common knowledge within the transportation industry as well as within the ICC that revenues and profits of the motor carrier industry have increased substantially during this period of time that such dock rates have been in effect. It

is, therefore, apparent that dock rates of TNT freight forwarders have in no way caused hardship or adversely affected motor carriers' profit making capability, and it is our belief that a "hollow cry" for investigation was made merely to stifle competition. (See JA35a, 36a.)

It is likewise evident by the attached photocopies of letters (JA46a-75a) supporting this publication that the shipping public's interest would be best served by allowing these provisions to remain in effect. This is certainly in harmony with the National Transportation Policy.

POINT IV

DOCKET NO. 35921 (SUB.NO. 1): TARIFF WEST: THE PUBLIC'S NEED FOR DOCK RATES AND THE EXPLANATION THEREOF.

RMB through its witness Keith Anderson (JA288a), relied on Statement 2C1-71 (JA289a) for average pickup and delivery costs in Trans Continental Territory. Mr. Anderson, therefore, comes up with an average pickup cost for what he calls a typical 5,000 lbs. shipment moving between New York and Los Angeles of 33.3¢ per cwt. If this were the 1940's or even the early 1950's, this average pickup cost might be valid. We are, however, talking about the case in 1974, probably the worst period of inflation in this country's history. In Ex Parte No. 296, PROCEDURES FOR PARTIAL RECOUPMENT OF INCREASED CARRIER LABOR COSTS, Exhibits 7 and 8 therein detail specific freight forwarder pickup costs, based on both Section 409 contracts and local cartage contracts (JA302a). It takes only a cursory glance to see that the 33.3¢ per cwt. figure is less than realistic. Freight forwarders generally use the same union local and Section 409 agents and the compensation paid to these carriers is generally the same level for all forwarders. As a matter of fact, many long haul motor carriers often use these same agents, more often than not, paying them a higher rate of

compensation than freight forwarders (JA302a). Mr. Anderson seeks to justify his use of motor carrier costs by stating at page 5 (JA290a) that pickup and delivery service is essentially similar whether performed by motor carriers or freight forwarders. This may be true as far as the bare essentials are concerned, but, the cost picture is quite different. Freight forwarders are limited to servicing only commercial zones in their own terminal areas with their own equipment, but costwise, are at the mercy of concurring motor carriers when it comes to servicing points outside such commercial zones. Motor carriers do not have such cost problems since their sphere of operations is not limited to commercial zones. Total less-than-carload tonnage handled by the three participating forwarders for the first eleven months of 1973 was 301,100,846 lbs. Expenditures for cartage and interline for this same period totalled $9,473,067. This averages out to a cost per cwt. of $3.15. One-half of this amount, or $1.57, would represent the average cost of pickup. The $1.00 per cwt. figure used to establish the dock rates here at issue is less than the average cost to respondents of performing pickup service. It must, therefore, follow that if it costs TNT in excess of $1.00 per cwt. to perform pickup service, with the

volume of traffic handled, it must logically be concluded that it costs shippers, who have nowhere near the volume of TNT's traffic, much more money on the average. Since the assailed schedules are available to all shippers, without discrimination, it would be an impossible task to portray each and every shipper's cost as suggested by RMB (See JA302a, 303a).

TNT wishes to reiterate that the $1.00 per cwt. reduction here at issue is not an "allowance". It is a pure and simple "dock rate." It would defy logic, therefore, to compare the $1.00 reduction to existing 5¢, 10¢, or 15¢ per cwt. allowances presently published by many motor carriers. To prove this point that dock rates have no realistic relationship to allowances in lieu of pickup, the Court's attention is directed to RMB's Exhibit No. 1 (JA285a) submitted by respondent in the lead proceeding. In Exhibit No. 1 (JA285a) attached to that pleading, RMB has shown a comparison of various dock rates applicable on specific commodities in various territories against the pickup rates applicable on those commodities. It can be noted that on Cleaning Compounds, liquid from New York, New York, to Los Angeles, California, the dock rates are $2.00, $1.39, and $1.67 per cwt. lower than the pickup rates on 500, 1,000, and 5,000 lbs. shipments

respectively. On Chinaware, Earthenware, and Glassware, the dock rates are $2.58, $2.26, and $2.11 lower than the pickup rates from New York to Los Angeles on 500, 1,000, and 5,000 lbs. shipments respectively. Similar wide differentials exist between the other dock rates and pickup rates shown in that Exhibit. RMB has never seen fit to protest or file a complaint against these publications. It stands to reason that if it is just and reasonable for shippers and receivers of Cleaning Compounds, Chinaware, Earthenware, and Glassware to receive the substantial dock rate reductions enumerated above, it is certainly as just and reasonable for shippers and receivers of other commodities to receive a $1.00 per cwt. reduction in their freight charges on dock delivered freight. If the Interstate Commerce Commission were to hold otherwise it would certainly open the door to charges of discrimination (See JA303a, 304a).

RMB at page 8 and 10 of its argument (JA293a-295a) contends that the original ABC Freight Forwarding Corporation and Midland Forwarding Corporation publications were not properly symbolized. The Commission's attention is directed to the second paragraph of Item 619-A in Supplement No. 29 to ABC's Tariff I.C.C.-F.F. No. 77 which refers to Column D

of Supplement No. 30 for dock rates (JA382a). Supplement No. 30 on its title page, carries the statement, "This supplement contains changes resulting in reductions" (JA387a). Both supplements were effective July 31st, 1972. There is no attempt at subterfuge here. What could be clearer than this title page statement? The identical situation prevails with respect to Item 619-A in Supplement No. 122 to Midland's I.C.C.-F.F. No. 35 (JA384a) which refers to Supplement No. 123 carrying the identical statement on its title page. The fact remains that when these provisions were transferred to TNT Tariff Agents, Inc., Tariff I.C.C.-F.F. No. 15 it was an honest oversight that they were not symbolized as new matter for the account of National Carloading Corporation. The tariff compiler knew that they were already effective for ABC and Midland and assumed, incorrectly, that they were also effective for National. (See JA304a).

Mr. Anderson makes reference to TNT's statement that this type of rate structure was to meet competition from unregulated pool car operators and was not designed to attract or accomplish diversion from competing regulated modes of transportation (JA290a). He then points to the letter of Mr. George W. Fogel of the Hand Tool Division of Dresser Industries wherein

Mr. Fogel states that he has diverted traffic from common carriers to avail himself of TNT's lower dock rates structure (JA291a). The key word in TNT's statement is "designed". This structure was not designed to divert traffic from competing regulated motor carriers but, by the very nature of the Interstate Commerce Act, a rate, rule or charge published in a tariff lawfully filed with the Commission must be applied without discrimination. TNT contends, even though the rate structure here at issue is open to everyone, that the bulk of tonnage to be diverted will be from unregulated pool car operators. A clear indication that the assailed schedules have not detrimentally affected RMB's members' traffic is the fact that their revenues and profits have increased substantially during the period of time that these dock rates have been in effect. Also, there have been no protests or complaints filed by competing freight forwarders with respect to these dock rates, a fact which would appear to speak for itself. (See JA304a, 305a).

POINT V

THE SUBJECT ORDERS ARE ERRONEOUS BECAUSE THEY FAIL TO PLACE THE BURDEN OF PROOF UPON ICC AND THE PROTESTANTS (EASTERN AND RMB) TO ESTABLISH A PRIMA FACIE CASE THAT THE ASSAILED, LEGALLY ESTABLISHED, TARIFF IS UNLAWFUL.

It is important to note here once again that Tariff East was legally published and became effective on September 10, 1973. Likewise, Tariff West was legally published and became effective September 10, 1973. Thus, the subject tariff was lawfully in effect prior to the institution of any proceedings by ICC.

It is well settled that when assailed tariffs have been put into issue by ICC, after they have already become legally effective, the requirements of due process of law mandate that the burden of proving the assailed schedules to be unlawful is upon ICC and the protestants to establish a prima facie case. Liquid Sugar to Ohio Points, 306 I.C.C. 298, 299-300. It is also axiomatic that TNT had no duty to go forward with any evidence at all until ICC and/or protestants established a prima facie case. See Malt Beverages from Golden, Colo., to Arizona, 305 I.C.C. 91, 92; Beer and Empty Containers -- Transport Service, Inc., 305 I.C.C. 63, 65; Livestock and Poultry Feed, Mis-

souri to Arkansas, 310 I.C.C. 13, 14; Sugar from Idaho and Utah to Oklahoma and Texas, 306 I.C.C. 271, 273.

As was demonstrated above beyond the shadow of any doubt, neither ICC nor Eastern nor RMB could establish a prima facie case because the evidence presented, which pertained to motor carrier costs (JA78a, 285a) rather than freight forwarder costs, was of no probative value and should have been excluded. Further, examination of the two initial decisions discloses that both Administrative Law Judges wrongly placed the burden of proof upon TNT.

The Tariff West Initial Decision (JA308a) is written in a tenor which derides TNT for failure to submit adequate evidence demonstrating the justness and reasonableness of the assailed tariff. For example, at page 5 of the decision (JA313a), the Administrative Law Judge chastises TNT for an insufficient showing:

> "In addition before the Commission can approve an allowance to shippers for carrier service, it must know what the shippers' costs are for the services where performed by or for the shippers. In the absence of such a showing, the evidence is inadequate to support a finding that the proposed allowance is not more than just and reasonable.
>
> "Even if the Commission would accept respondents' largely unsupported statement that forwarder pickup costs are skyrocketing and

> respondents' $1.57 per 100 pound forwarder pickup costs . . . respondents did not attempt to show the pickup costs when the shippers provide such services themselves." (Emphasis added.)

The Tariff East Initial Decision is no less revealing of the Administrative Law Judge's misapplication of the proper burden of proof. At page 10 of the decision (JA114a), the Judge states:

> "TNT did not establish by evidence of the record that the $1.00 per 100 pounds provided for in the items is commensurate with the forwarders' or shippers' cost for performing delivery or that the resulting reduced rates are compensatory. To state that costs are skyrocketing does not establish the level of costs . . . . The convenience resulting from a shipper providing the delivery service, in lieu of a forwarder and the letters of the shippers provide no legal reason for altering the conclusion." (Emphasis added.)

It is also interesting to note that the Tariff East decision does not in any way address itself to the different burden of proof that was intervenor Lifshultz's, as the proponent of a not yet effective tariff, and TNT, whose tariff had already become effective.

Since the assailed schedules of TNT had been in effect prior to the issuance of ICC's order of investigation, it is clear that the burden of proof was not on TNT. This had clear-

ly been the position of ICC for some time. In Import Volume Forwarder Rates from its Pacific Coast to the East, 310 I.C.C. 399, 400, Division 3 held that where an order of investigation included a number of rates which were in effect prior to the date of the order and which were not changed in any respect, the burden of proof is not upon the respondent, but rather, is upon the Commission and the protestants. This case is on all points with the one at Bar.

In Rice from Arkansas to Illinois and Missouri, 306 I.C.C. 111, 114, Division 2 held at page 114, in similar facts: "There is no burden on the respondents in this proceeding to establish that their rates are just and reasonable nor would the evidence of record support a finding that they are unlawful."

In Class Rates from Chicago, Illinois to Texas, 308 I.C.C. 467, 468, the basic proposition that the burden of proof as to the unlawfulness of an existing, effectuated schedule is on those who wish to show the unlawfulness is made clear. It is reaffirmed once again in Forwarder Class Rates From and To or Between Official and Western Truckline Territory, 310 I.C.C. 785, 790, where the Commission held at page 790, that, "The burden of proof as to American's rates is not on American, but

on those who seek to have those rates found unlawful."

The mere fact that the proceedings (Tariff East and Tariff West) were ancillary to an investigation and suspension proceeding does not alter or modify the principle of law that the burden of proof remains on those seeking to hold legally established rates unlawful.

Thus, in Lead and Zinc from Chicago, Illinois to Detroit, Michigan, 309 I.C.C. 103, 104, the respondents' tariff became effective only a very short time prior to ICC's investigation order. In the proceedings before ICC, only the protestant submitted evidence. The respondent did not even appear. Nonetheless, the Commission rightfully held that:

> "The rate here considered was in effect prior to the time this investigation was instituted, and thus no burden of proof rests upon respondent. It follows that no inference of unlawfulness can be drawn from the fact that the respondent chose not to introduce any evidence. The costs presented are based on the average costs of all motor carriers operating in Central States Territory. We are not satisfied that such costs are representative of the respondent's costs on the articles here considered. We are not satisfied that the considered rate constitutes a destructive practice." (Emphasis added.)

Thus, as these cases clearly demonstrate, TNT was under no obligation to introduce any evidence at all before ICC. Moreover, the evidence submitted by Eastern and RMB was not

probative of the issues involved. Even if TNT did not present evidence, which it did, of its costs and the costs of shippers, TNT's case should have prevailed. There was a complete misappreciation for this simple statement of the applicable law which resulted in error on ICC's part.

The Administrative Procedure Act, 5 U.S.C.S., Section 556 (d) provides that:

> "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

This provision has received full and absolute approval by the Courts, as in Steward v. Penny, (D.C. Nev.) 238 F. Supp. 821. The Courts have insisted upon the fullest implementation of statutory requirement even where the proponent of the rule or order is an administrative agency rather than a private individual as in Kirby v. Shaw, 358 F.2d 446 (9th Cir. 1966), where the Court held that the burden of proof rested upon the Post Office Department as the proponent of a supplemental fraud order to at least establish that two products offered by sale by the appealing party, the first of which had been banned from the mails by the initial fraud order, were essentially the same and were offered for sale by the appealing party in essentially the same representations. See also, Eastern Motor

Exp. v. U.S., (D.C., Ind., 1952) 103 F. Supp. 694, affirmed, 344 U.S. 298, rehearing denied, 345 U.S. 913.

To the same effect is the holding in Concrete Materials v. FTC, 189 F.2d 359 (7th Cir. 1951), where the Court held that, in a hearing to determine whether the company should cease and desist making certain representations, the burden was on the Federal Trade Commission to prove its charges by competent, relevant and substantial evidence.

The foregoing cases clearly show that due process of law requires that the burden of proof to establish a prima facie case is at all times upon the proponent of the rule.

In this case, the burden must be met by ICC and the respective protestants (Eastern and RMB). This principle of law survives without alteration even where the respondent submits no evidence or inconclusive evidence. It follows that unless the Commission and protestants establish a prima facie case in the first phase by submitting valid and substantiated evidence, ICC cannot rule against TNT merely because it feels that TNT failed to submit adequate evidence to support its position. Any other conclusion would relieve ICC and protestants of any burden of proof and would fly in the face of the concept of due process of law.

TNT asserts, parenthetically at this point, that even if the protestants (Eastern and RMB) and/or ICC had presented a prima facie case against the justness and reasonableness, the cumulative evidence submitted by TNT showed beyond any doubt that the pickup costs to TNT, shippers and cartage concerns exceeded the dock rates here assailed. Thus, ICC, by applying its own standards -- should have concluded that the tariffs were just and reasonable. See United States v. Illinois Cen. R. Co., 263 U.S. 515; United States v. Chicago, M., St. P., & P.R. Co., 294 U.S. 499, 506.

It is important to further note that in the instant proceeding, ICC did not submit any evidence in support of its allegation of unlawfulness. Rather, ICC and the Administrative Law Judges relied upon evidence so general in nature, which was submitted by motor carriers and not at all related to freight forwarders, that it can hardly be called substantial and pertinent evidence sufficient to establish a prima facie case. See General Commodity Between Chicago and New York, 306 I.C.C. 243; Distribution Rates -- Central Freight Trucking, Inc., 306 I.C.C. 769; Foodstuffs between Rochester, N.Y. and Medina, Ohio, 306 I.C.C. 646. Both Judges seized upon the improperly accepted evidence submitted by Eastern and RMB and used this

as the basis of their findings that the assailed schedules were unjust and unreasonable.

I respectfully submit the following inquiry: Did Eastern and RMB to prove the unreasonableness of the dock rates, submit evidence of carriers' earnings, volume or density of traffic, length of haul, what the traffic in a given commodity will bear, cost and value of service, nature of the commodity and influence of competition? See I.C.C. v. Union Pacific R. Co., 222 U.S. 541, 549; Illinois Central RR Co. and Southern Ry. v. United States, 101 F. Supp. 317, 324, 325; El Dorado Oil Works v. United States, 328 U.S. 12, 19. I respectfully submit to this Court that they did not.

It is respectfully submitted that this constitutes error.

POINT VI

THE SUBJECT ORDERS WERE ERRONEOUS BECAUSE THEY BOTH CONCLUDED THAT THE RESPECTIVE PROTESTANTS (EASTERN AND RMB) MADE OUT PRIMA FACIE CASES AGAINST THE ASSAILED DOCK RATES, DESPITE PROTESTANTS' ABSOLUTE AND TOTAL FAILURE TO INTRODUCE ONE SCINTILLA OF EVIDENCE PERTAINING TO THE COSTS OF FREIGHT FORWARDERS.

There are distinct differences between the business of a freight forwarder and a motor carrier as previously pointed out. It is obvious that the Congress had full recognition of these differences between freight forwarders and motor carriers when it enacted the Interstate Commerce Act. They are each treated in different Acts (Part II and Part IV) of the Interstate Commerce Act. Further, manifestations of the Congressional intent to preserve recognition of these differences are found in the Act itself. Section 406(d) of the Interstate Commerce Act states, in part:

> "In the exercise of its power to prescribe just and reasonable rates and charges of freight forwarders, and classifications, regulations, and practices relating thereto, the Commission shall give due consideration, among other factors, to the inherent nature of freight forwarding . . . ."
> (Emphasis added.)

Additionally Congress again seeking to preserve the differences between the two types of Common Carriers and recognizing different modes of transportation, enacted Section 15(a) 3 of the Interstate Commerce Act:

> "In a proceeding involving competition between carriers of different modes of transportation subject to this Act, the Commission, in determining whether a rate is lower than a reasonable minimum rate, shall consider the facts and circumstances attending the movement of traffic by carrier or carriers to which the rate is applicable. Rates of a carrier shall not be held up to a particular level to protect the traffic of any other mode of transportation, giving due consideration to the objectives of the national transportation policy declared in this Act." (Emphasis added.)

Thus, not only was Congress aware of the inherent differences between freight forwarding and other activities within the review of the Act, but it mandated that in proceedings such as the instant one, which pertain to determining the reasonableness of a rate, these differences must be considered.

ICC itself has in the past had occasion to interpret the Congressional mandate as in Eastern Central Motor Carriers Assn., Inc., v. ABC Freight Forwarding Corp., 300 I.C.C. 733, 736-7, where the Commission stated:

> "Basically, both rail and motor carriers in their normal daily operation consolidate small shipments into carloads or truckloads.

> Both modes of transportation assemble small shipments at selected terminals, carry them in line haul movements to other terminal points, and thereafter effect delivery after breaking bulk in a manner similar to a freight forwarder distribution service. However, freight forwarders are not made subject to the provisions of Section 4 of the Act. We must give due consideration of the inherent nature of freight forwarding in determination of the lawfulness of their rates and charges. Thus, freight forwarding service to any point outside the distribution point beyond notwithstanding that the point of delivery is geographically situated intermediate to the distribution point over the route of the underlying carrier. Also, the additional cost of handling freight forwarder shipments to such off-station points must be considered in passing upon the reasonableness of the rates published thereto. From the evidence before us we would not be warranted in finding that defendant's higher rates to intermediate points more than to more distant points of distribution are unlawful by reason of that fact alone." (Emphasis added.)

The subsequent report by the Commission on reconsideration, 303 I.C.C. 773, did not repudiate this analysis.

With respect to Tariff East, a reading of page 7 of the Administrative Law Judge's initial decision (JAIIIa) demonstrates that he was impressed with protestant Eastern's submission which purported to show that the fully allocated costs to its member carriers to perform pickup service exceeds $1.00 per 100 lbs. for shipments of 400 lbs. and under but the cost

falls below that on shipments of 500 lbs. or greater. Eastern also submitted similar figures for other motor carrier tariff bureaus, operating within the same area, which showed that 400 lbs. was the threshold. TNT here asserts, as it has several times prior, that comparing freight forwarding costs to motor carrier costs is like comparing "oranges to apples."

In the Tariff West proceedings, RMB also submitted costs data, but only pertaining to motor carrier costs, not freight forwarder costs.

On the other hand, the record in this case contains the statement of Mr. Craig Rockey (JA150a-159a, 173a-176a). This statement pertains to the costs of freight forwarders and is, in fact, the only evidence in the record that does so. This document clearly shows that the dock rates here assailed by ICC are just and reasonable by the criteria discussed in both the Tariff East and Tariff West initial decisions. Moreover, the Craig Rockey statement (JA150a-159a, 173a-176a) directly refutes the assertions made in Eastern's submissions. Yet ICC sought for reasons best known to itself, to predicate its orders on evidence that should have been excluded as irrelevant. These objections have been continuously voiced by TNT but have fallen on deaf ears.

It is clear that the submissions by Eastern and RMB did not represent the costs involved in a freight forwarders' operation. In view of the inapplicability of their cost analyses, it is clear that Eastern and RMB's submissions were of no probative value to the inquiry then before ICC and should have been totally disregarded. It is absolutely incredible to contend, as ICC apparently did, that the respective protestants (Eastern and RMB) established a prima facie case against the assailed tariffs. TNT now asks how one can establish a prima facie case based upon evidence that should have been excluded.

It is clear, based upon the above, that ICC should have found as it did in Lead and Zinc from Chicago, Illinois to Detroit, Michigan, 309 I.C.C. 103, 104, where the Commission, Division 2, held that where a protestant's submission consists of a cost analysis which fails to represent the respondent's costs, it can not be considered.

In the instant matter, the same conclusion should have been reached by ICC. The fact that it concluded differently clearly reveals its error. It is preposterous to conclude, as the Administrative Law Judges apparently did, that Eastern and RMB established prima facie cases.

POINT VII

ICC ACTED ARBITRARILY AND CAPRICIOUSLY IN FINDING THE $1.00 PER 100 POUNDS UNJUST AND UNREASONABLE.

Even if TNT takes at face value the statements of ICC as to what proof it was obligated to submit in order to preserve the assailed dock rates, it is evident that all the necessary evidence to support such a finding has already been presented. Using the precedents referred to by ICC, a finding of justness and reasonable is required if TNT can show that the dock rate is compensatory for the work performed and that the costs of shippers and cartage companies to perform this service are greater than the rate. TNT has clearly demonstrated all of this (JA30a, 98a, 117a, 136a, 150a-159a, 168a, 173a-176a, 181a, 195a, 301a, 315a, 332a, 373a).

TNT respectfully refers this Court to the verified statements of Craig F. Rockey (JA150a-159a, 173a-176a) which arrives at a conclusion which clearly portrays that the subject tariffs are just and reasonable. Mr. Rockey's statement demonstrates that with the bulk of TNT's shipments handled, the $1.00 dock rate is compensatory and therefore it is just and reasonable. See in this connection Duplate Corp. v. Triplex Safety Glass Co., 298 U.S. 448, 458.

Despite the incredible statements made by the Administrative Law Judges that TNT had not demonstrated that freight forwarder costs were skyrocketing, Mr. Rockey's statement, which takes 1974 costs into consideration, bears this out. Two points should be noted. Mr. Rockey's statement is the only evidence before ICC which pertains specifically to freight forwarder costs. Secondly, ICC's claim that TNT's skyrocketing costs were not demonstrated, along with the cavalier attitude by which ICC dismissed TNT's contention of skyrocketing costs, was indicative of its behavior throughout the proceedings. TNT made specific reference to ExParte No. 296, PROCEDURES FOR PARTIAL RECOUPMENT OF INCREASED CARRIER LABOR COSTS (JA118a). These documents are part of ICC's files and the cost evidence therein is now a matter of public record. Additionally, TNT's participants have hundreds of Section 409 contracts on file with ICC, an examination of which would disclose substantial increases. Further, ICC has apparently taken the ostrich approach to the energy crises, with its six percent (6%) Emergency Fuel surcharge.

Additionally, ICC had before it thirty (30) letters from shippers in support of the dock rates of TNT (as noted earlier,

an additional thirty (30) letters were rejected by ICC). TNT submits these letters (JA46a-75a, 217a-284a) as proof of the fact that shippers' costs for performing pickup service or having it done by a cartage company exceeds the TNT tariffs; ICC would have TNT produce, instead of such letters, statements of costs from all shippers and cartage concerns. Certainly, no carrier or individual could furnish the cost of every shipper, cartage agent and consignee in these United States or potential shipper and consignee. No regulated carrier should be saddled with such an impossible burden which has no relevancy to this matter. Moreover, it would be particularly onerous to place this burden upon TNT whose subject tariffs are to be viewed in an aura of legitimacy because they took effect prior to ICC's investigation order.

A literal reading of the initial decisions indicates that the Administrative Law Judges would have TNT show the costs of all shippers and consignees and all potential shippers and consignees who might utilize the dock rates. It would be an impossible task to even seriously attempt such an undertaking. ICC tells TNT to submit proof with a rule too unweildy to manage. For the sake of argument, assuming for the moment that it would be possible to obtain accurate

cost data from all shippers and consignees, what if the average costs of the vast majority of shippers were found to be greater than the $1.00 per hundred pound dock rate? Would ICC then hold that, because a few shippers had costs less than the rate, all shippers would be precluded from availing themselves of the dock rates? Or would ICC just have TNT, by tariff provision, preclude each and every shipper whose costs were less than $1.00 per cwt.? To accomplish this, TNT would have to require every shipper and consignee to supply an affidavit that their cost is more than $1.00 per cwt. each time a shipment is made. But wait! This is ridiculous. Wouldn't it be easier to eliminate published tariff dock rates and only have allowances. And while doing that, let us eliminate all tariffs of all types of all Common Carriers and "we'll all run down" to the Interstate Commerce Commission for it to approve each and every shipment that takes place each day in these United States. One could follow this line of reasoning to a great number of absurd conclusions, all of which would only serve to illustrate how ludicrous ICC's requirement of demonstrating shipper and consignees costs is.

ICC has concluded that the subject TNT dock rates are

disruptive. Not only is such a conclusion erroneous in law, but it is likewise erroneous in fact and arbitrary and capricious. Neither ICC nor Eastern nor RMB has not shown by one scintilla of evidence that the TNT dock rates which have been in effect now for some period of time, have resulted in the downward revision of any other carriers' rates, nor that there has been a single pound of traffic diverted as a result. Additionally, no one has demonstrated a necessity to downwardly revise their rates due to the TNT dock rates, nor has anyone demonstrated any diversion of traffic. Further, not one member of the Eastern and RMB associations has made a showing or claim. For ICC to conclude as it did, without one scintilla of evidence on the record, was reversible error.

It should here be stated that the cancellation of the TNT dock rates which are beneficial to shippers and consignees and hence to all consumers, and non-inflationary, would by virtue of ICC's actions here, result in increased inflation. TNT respectfully submits that such a result is in contravention of the public interest and is unconscionable.

POINT VIII

EVEN IF ICC CAN SOMEHOW JUSTIFY ALL ITS ACTIONS HERETOFORE CRITICIZED HEREIN, IT CANNOT JUSTIFY THE ARBITRARY AND CAPRICIOUS ACT OF TOTALLY CANCELLING THE SUBJECT TARIFF.

In the Tariff East initial decision, at page 7 (JAIIIa) the Administrative Law Judge stated that the protestant Eastern submitted data showing that the fully allocated costs to its member carriers to perform pickup services exceeds $1.00 per 100 lbs. for shipments of 400 lbs. and under, but the cost falls below that on shipments of 500 lbs. and above. TNT, of course, denies the relevancy of such facts as they pertain only to motor carriers and, in fact, are disputed by TNT's own cost analysis.

Yet, TNT urges this Court to note that even if the above findings are absolutely correct, which they are not, the only possible logical conclusion which can flow therefrom is that TNT's dock rate ought to be cancelled for shipments over 500 lbs. On such facts, the laws of logic compel a finding that Eastern did not make out a *prima facie* case for the segment of freight traffic of shipments of 400 lbs. or less.

Similarly, it is noteworthy that in the Tariff West proceedings RMB saw fit to only present motor carrier costs in connection with 5,000 lbs. shipments. Is this because their costs exceed $1.00 per hundred pounds on shipments of less than 5,000 lbs.? More noteworthy is the Administrative Law Judge's acceptance of this evidence, and ICC's absolute approval of such acceptance, in calling for the wholesale cancellation of the assailed dock rates, including the weight categories of less than 5,000 lbs. It was absolutely impossible to properly conclude that a prima facie case was made out against the assailed dock rates for this segment of traffic.

It is difficult to hypothesize a more grossly arbitrary and capricious act than the wholesale cancellation of the entire rate schedules here involved. Where logic so clearly dictates the proper course of conduct, no citation of law is necessary to sustain this proposition.

POINT IX

ICC, BY ITS USE OF SWEEPING GENERALIZATIONS AND "BOILER PLATE" LANGUAGE IN ITS OWN ORDERS HAS FAILED TO APPRISE TNT OF ICC'S RATIONALE FOR ITS DECISIONS AND HAS, THEREBY, FURTHER DENIED TNT DUE PROCESS OF LAW.

Throughout both the Tariff East and Tariff West proceedings, error has been built upon error. As demonstrated in the earlier discussed points of this brief, the initial decisions of the Administrative Law Judges are erroneous in several respects. Neither Administrative Law Judge had any grasp of the issues before him. This is the only explanation for the use of allowance nomenclature in the decisions. Not only did each Judge fail to see the clear distinction between dock rates and allowances, but each further compounded his mistakes by relying upon precedents cited by Eastern and RMB, which pertained to proposed allowances and not already effective dock rates. This, in and of itself, is reversible error.

These errors, however, were further compounded by the Administrative Law Judges placing the burden of proof upon TNT, notwithstanding the fact that TNT's tariffs had already become effective prior to initiation of ICC's investigation. TNT could have stood mute, and should rightfully have pre-

vailed in the cases. Again, this misapplication of the rules regarding burden of proof, in and of itself, clearly warrants reversal of ICC's decisions.

Yet, ICC in what must be described as an earnest attempt to "bungle these cases beyond belief," did not stop there. The Administrative Law Judges failure to exclude the evidence of Eastern and RMB which, since it pertained to motor carriers rather than freight forwarders, was of absolutely no probative value. They then concluded, by implication at least, that Eastern and RMB had established a prima facie case against the assailed tariff. Such a conclusion was clearly erroneous. ICC then, again, compounded the error by chastising TNT for the evidence it gratuitously submitted.

TNT's protests to the manner in which these proceedings were held fell upon deaf ears. The evidence submitted by TNT showed, beyond any doubt, that the assailed tariffs were just and reasonable. Yet, ICC held otherwise.

In the ICC orders which sustained the findings of the Administrative Law Judges initial decisions, and which denied TNT's requests and petitions for reconsideration, ICC utilized general "boiler plate" language. This added insult to injury and salt to the wounds. ICC thereby has denied TNT its "day

in Court" and has done so in a most cursory and arrogant manner. ICC's failure to state intelligible reasons for its decisions constitutes reversible error of law under the Administrative Procedure Act, 5 U.S.C.S., Section 1007. See Lawrence v. C.A.B. (1st Circ.) 343 F.2d 583. The Commission cannot reach a decision by stating general conclusions without setting forth specific findings and rational conclusions based upon substantial evidence in the record as a whole. National Freight, Inc. v. U.S., 354 F. Supp. 1153.

The Supreme Court of the United States has stated that, ". . . the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed." SEC v. Chenery Corp., 318 U.S. 80 (1943). See also Davis, Administrative Law Text, 316.07.

In Phelps Dodge Corp. v. NLRB, 313 U.S. 177 (1941), the Supreme Court declared:

> "From the record of the present case we cannot really tell why the Board has ordered reinstatement of the striker who obtained subsequent employment . . . . The administrative process will best be indicated by clarity of its exercise. Since Congress has defined the authority of the Board . . . and has charged the federal courts with the duty of reviewing . . . it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order."

It is clear that the instant orders fail to adequately explain themselves, and, therefore, ought to be rescinded.

CONCLUSION

The conclusion is inescapable that the subject orders of ICC now before this Court for review are arbitrary, capricious, erroneous in fact and in law, and unsupported by substantial evidence, and should, therefore, be rescinded.

Respectfully submitted,

Elliott C. Winograd
Attorney for Petitioners

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No.

TNT TARIFF AGENTS, INC., et ano.,

Petitioners,

- against -

INTERSTATE COMMERCE COMMISSION, et ano.,

Respondents.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the **21st** *day of* **July** *19* **75**, *deponent served the annexed* BRIEF

upon **1) Fritz Kahn and Lloyd John Osborne** *attorney(s) for*
2) John H.D. Wiggen and Thomas E. Karper

Respondents *in this action, at* **1) 12 and Constitution Ave, N.W., Wash., D.C.**
2) Department of Justice, Wash., D.C.

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* ES *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this **21st**
day of **July** *19* **75**

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TNT TARIFF AGENTS, INC., et ano.,

Petitioners,

against

I.C.C., and The UNITED STATES OF AMERICA,

Respondents.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

James A. Steele *being duly sworn,*

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at
310 W. 146th St., New York, N.Y.

That on the **21st** *day of* **July** *19*75 *at* **26 Broadway, N.Y., N.Y.**

deponent served the annexed Brief *upon*

Casey Lané & Mittendorf

the **Attorneys** *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein,*

James A. Steele
Print name beneath signature
JAMES A. STEELE

Sworn to before me, this **21st**
day of **July** *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977